BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANGEL NELSON	)	
Claimant	)	
VS.	)	
	)	
WAL MART	)	Docket No. 1,061,944
Respondent	)	
AND	)	
	)	
ILLINOIS NATIONAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of Administrative Law Judge Rebecca Sanders' January 9, 2013 preliminary hearing Order. John J. Bryan of Topeka, Kansas, appeared for claimant. Matthew R. Bergmann of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

Judge Sanders ruled claimant sustained an aggravation of a preexisting condition and failed to prove that the work accident was the prevailing factor in her need for medical treatment.

The record on appeal is the same as that considered by Judge Sanders and consists of the November 28, 2012 preliminary hearing transcript and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

Claimant argues her accident was the prevailing factor in causing her need for medical treatment. Claimant asserts her injury did not solely result in aggravation, acceleration or exacerbation of a preexisting condition. Claimant contends the successful outcome of the removal of two loose bodies proves the need for surgery was the June 7, 2012 accident. Claimant requests medical treatment and payment of temporary total disability benefits. Respondent requests that Judge Sanders' order be affirmed.

The issue before the Board is:

Was claimant's June 7, 2012 accidental injury the prevailing factor in causing her disability and need for medical treatment?

FINDINGS OF FACT

Claimant has worked as a receiving associate for respondent since March 5, 2008. This is a full-time position requiring claimant to be on her feet eight hours a day, five days a week. Her duties include putting freight away and occasionally unloading trucks.

On June 7, 2012, claimant was pulling a pallet of frozen products when she turned to ensure the area was clear of customers and felt her left knee pop, experiencing immediate pain.

Claimant has a long history of left knee problems. In December 2000, claimant suffered an ACL tear and a medial meniscus tear from slipping and falling on ice. Claimant underwent an ACL reconstruction and partial left lateral meniscectomy by David J. Clare, M.D., on January 25, 2001. Although initially showing improvement following surgery, claimant suffered several aggravations. Her left knee was struck by a 150-pound Rottweiler in May 2001. She twisted her left knee when she fell on a wet floor in October 2001. She struck her left knee against the dashboard during a motor vehicle accident in June 2002. During this time, claimant's complaints of left knee pain and discomfort continued. On April 14, 2003, Dr. Clare sent claimant a letter stating he had come to the conclusion that her "medical needs could best be served in another office."[1]

Claimant testified that while she experienced aches in her left knee between 2004 and 2012, she did not seek any medical treatment. However, she admitted to having taken medication once in a while for arthritis in her knees. A report dated October 14, 2011, by Peter S. Rosa, M.D., noted claimant "has had trouble with her knees since 2001" and complained "they crack, grind and pop all of the time."[2] Claimant's chief complaint at that visit was her right knee. Dr. Rosa diagnosed claimant with bilateral crepitus and obvious chondromalacia.

Following the accident on June 7, 2012, claimant testified she reported the incident to the assistant manager, Shawn Ione, but did not request medical treatment. By the time claimant left work that morning, her left knee was swollen and she was having difficulty walking on it. Claimant continued to perform her regular job, but testified she would use a cane at work whenever she was required to do a lot of walking.

On June 27, 2012, claimant went to Sheri Wessel, PA-C, at Hiawatha Community Hospital Family Practice, with complaints of left knee pain. Ms. Wessel noted claimant was having to "use a cane at work at times" and "hasn't noticed anything specifically that she

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[1] P.H. Trans., Resp. Ex. B at 27.

[2] *Id.*, Resp. Ex. C. at 1.

did to hurt this knee."[3] Claimant testified that Ms. Wessel's recording of what was said during this appointment was inaccurate. Claimant testified that she told Ms. Wessel that unloading trucks caused her left knee injury. Ms. Wessel diagnosed claimant with internal derangement of the left knee and a probable meniscal tear. Ms. Wessel ordered an MRI.

By early-July 2012, claimant testified her knee "wasn't getting better" so she completed an accident report and was sent by respondent to Dustin Williams, the company nurse. Mr. Williams ordered an MRI, which was performed on July 19, 2012. Claimant testified she was told that the MRI showed a tear in her cartilage. Thereafter, claimant received a denial letter from the insurance carrier dated August 2, 2012.

Claimant sought medical treatment on her own with Dr. Clare and was initially seen on August 21, 2012. Claimant told Dr. Clare she injured her left knee from pulling a loaded pallet on June 7, 2012. Dr. Clare noted the MRI showed post-operative ACL changes, degenerative changes with osteophyte formation to the medial femoral condyle, patellar chondromalacia, and post-operative changes versus tear of the medial meniscus. Dr. Clare diagnosed claimant with left knee pain, moderate left knee osteoarthrosis and a left knee injury occurring on June 7, 2012. Dr. Clare performed a steroid injection and prescribed a knee support. Dr. Clare opined that claimant "does have some post-traumatic degenerative changes noted to the left knee as well as irregularity noted to the medial meniscus that is likely reflective of post-op changes rather than anything acute."[4]

On September 24, 2012, claimant returned to Dr. Clare with complaints of severe stabbing pain over the medial aspect of the left knee. The injection had provided no relief. X-rays were ordered. Dr. Clare recommended an arthroscopy due to the significance of symptoms and claimant's failure to obtain relief with conservative treatment.

Dr. Clare performed a left knee arthroscopy with chondroplasty medial femoral condyle, chondral chondroplasty patella, and midfemoral trochlea and loose body removal on October 10, 2012. Mild fraying of the posterior horn of the medial meniscus was noted. The operative report noted claimant's prior ACL graft was intact and no obvious meniscus tears were encountered. Two semi-adhered chondral loose bodies were found lodged within the medial compartment, each measuring 7 to 8 millimeters in diameter. Such loose bodies were removed. Claimant's postoperative diagnosis was persistent left knee pain with osteoarthritis and multiple loose bodies. Claimant was taken off work from October 10 to October 15, 2012.

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[3] *Id.*, Resp. Ex. B at 3.

[4] *Id.*, Resp. Ex. D at 10.

On October 15, 2012, claimant returned to Dr. Clare for a post-op visit. Dr. Clare noted claimant had significant degenerative arthritic involvement. Dr. Clare recommended strengthening and range of motion exercises. In an FMLA form dated October 15, 2012, Dr. Clare indicated claimant's diagnosis was left knee osteoarthritis and her condition started on June 7, 2012.[5] Claimant was taken off work from October 15, 2012 to October 29, 2012.

On November 5, 2012, an independent medical evaluation was performed by Ronald Zipper, D.O., at the request of the respondent. In his report, Dr. Zipper addressed causation as follows:

> There was insufficient medical evidence that I could conclude that Ms. Nelson sustained an injury on 06/07/12. No witness statement, or incident report was filed on 06/07/12. Her history to me was that she completed her work shift on the alleged date of injury. She testified that she continued to work at her job description without submitting an Incident Report until 07/08/12. On 06/27/12, while being treated by at Hiawatha Family Practice for her diagnosis of hyperglycemia, she complained of subjective left knee pain with weight-bearing. She gave a history of ". . . She has had to use a cane at work at times. She hasn't noticed anything specifically that she did to hurt this knee . . .". No joint effusion was noted on physical examination. There was a false positive meniscal sign that was not supported at surgery.[6]
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> . . .
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> . . . Ms. Nelson's chief complaints had no objective evidence that they were causally related to her work. They were not the prevailing factor in her present need for medical treatment.
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> . . .
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> Ms. Nelson's need for treatment was and is secondary to her pre-existing chronic and symptomatic bilateral knee degenerative arthritis, and her chronic obesity. Severe chondromalacia is an expected diagnostic finding in any, or all knee compartments in bilateral multiply injured and operated knees. Loose joint bodies are commonly found in these knees as a natural progression with chronic symptomology, which in this case exceeded a decade. The aggravating factor is Ms. Nelson's obesity.

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[5] *Id.*, Cl. Ex. 5.

[6] *Id.*, Resp Ex. A at 4.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b provides, in part:

(c) The burden of proof shall be on claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which claimant's right depends. In determining whether claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 provides, in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic. . . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(I) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(I) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

> (iii) accident or injury which arose out of a risk personal to the worker; or
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> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
> . . .
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> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.
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> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

ANALYSIS

Before May 15, 2011, Kansas law allowed compensation for any aggravation, acceleration or intensification of a preexisting condition.[7] The new statutory changes indicate that an injury is not compensable solely[8] because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic. An accident must now be the prevailing factor in causing an injury, medical condition and resulting disability or impairment. An injury resulting from the natural aging process, normal activities of day-to-day living or a risk personal to the worker does not arise out of or in the course of employment.

Claimant asserts Judge Sanders erred in concluding the June 7, 2012 accident resulted in the aggravation of a preexisting condition and that the prevailing factor in claimant's injury, medical condition and resulting disability was the preexisting condition. Claimant notes that her preexisting condition consisted of left ACL and meniscal injuries that were repaired. Claimant notes that such preexisting injuries were not affected by the June 7, 2012 accident. Claimant contends the presence of two loose chondral bodies proves that claimant had more than a sole aggravation of a preexisting condition because:

> There is no evidence these chondral 7 to 8 millimeter loose bodies existed prior to the 6/7/12 injury. These loose bodies represent objective evidence of a new problem which caused the symptoms claimant reported.[9]

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[7] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 589, 257 P.3d 255 (2011).

[8] The word "solely" is not defined in the Kansas Workers Compensation Act. Solely is defined as "singly" or "[e]xclusively." *Poull v. Affinitas Kansas, Inc.*, No. 102,700, 228 P.3d 441 (Kansas Court of Appeals unpublished decision dated Apr. 8, 2010).

[9] Claimant's Brief at 4.

The Appeals Board has found accidental injuries resulting in a new physical finding, or a change in the physical structure of the body, to be compensable, despite claimant also having an aggravation of a preexisting condition. Several prior decisions tend to show compensability where there is a demonstrated physical injury above and beyond a sole aggravation of a preexisting condition:

- A claimant's accident did not solely cause an aggravation of preexisting carpal tunnel syndrome when the accident also caused a triangular fibrocartilage tear.[10]

- A low back injury resulting in a new disk herniation and new radicular symptoms was not solely an aggravation of a preexisting lumbar condition.[11]

- A claimant's preexisting ACL reconstruction and mild arthritic changes in his knee were not solely aggravated, accelerated or exacerbated by an injury where his repetitive trauma resulted in a new finding, a meniscus tear, that was not preexisting.[12]

- An accident did not solely aggravate, accelerate or exacerbate claimant's preexisting knee condition where the court-ordered doctor opined the accident caused a new tear in claimant's medial meniscus.[13]

- Claimant had a prior partial ligament rupture, but a new accident caused a complete rupture, "a change in the physical structure" of his wrist, which was compensable. [14]

- A motor vehicle accident did not solely aggravate, accelerate or exacerbate claimant's underlying spondylolisthesis when the injury changed the physical structure of claimant's preexisting and stable spondylolisthesis.[15]

In all of these cases, claimant proved his or her accident was the prevailing factor in causing the injury, medical condition and resulting disability.

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[10] *Homan v. U.S.D. #259*, No. 1,058,385, 2012 WL 2061780 (Kan. WCAB May 23, 2012).

[11] *MacIntosh v. Goodyear Tire & Rubber Co.*, No. 1,057,563, 2012 WL 369786 (Kan. WCAB Jan. 31, 2012).

[12] *Short v. Interstate Brands Corp.*, No. 1,058,446, 2012 WL 3279502 (Kan. WCAB July 13, 2012).

[13] *Folks v. State of Kansas*, No. 1,059,490, 2012 WL 4040471 (Kan. WCAB Aug. 30, 2012).

[14] *Ragan v. Shawnee County*, No. 1,059,278, 2012 WL 2061787 (Kan. WCAB May 30, 2012).

[15] *Gilpin v. Lanier Trucking Co.*, No. 1,059,754, 2012 WL 6101121 (Kan. WCAB Nov. 19, 2012).

Claimant's argument is logical, in the sense that there was no aggravation of *some* of the left knee problems identified in the 2001 knee surgery. However, a comparison of the 2001 and 2012 operative reports shows that claimant had extensive chondromalacic changes. Both surgeries addressed the extensive arthritis, even though the 2001 surgery addressed ACL and meniscal injuries as well. Claimant had an arthritic knee in 2001 and still had an arthritic knee in 2012. Claimant's longstanding degenerative arthritis was a preexisting condition that Dr. Zipper opined was the cause of her left knee complaints and need for surgery.

Claimant argues that the loose chondral bodies were due to the 2012 accident. It is *possible* that claimant's accident caused the two chondral bodies to come loose or to become lodged in the claimant's medial compartment, but there is no medical testimony or evidence to support such theory. This Board Member cannot discern when the chondral bodies came loose. Similarly, it is unknown whether the work accident had anything to do with the chondral bodies becoming lodged in the medial compartment of claimant's left knee. There is also no proof that the loose chondral bodies generated claimant's left knee complaints. Claimant's theory lacks medical support. The prevailing factor requirement cannot be based on speculation. The only causation opinion in evidence, that of Dr. Zipper, notes that loose bodies are commonly found in arthritic and previously-operated knees. Dr. Zipper observed that the claimant's need for medical treatment stemmed from her chronic and degenerative knee arthritis and her obesity. Moreover, Dr. Clare noted longstanding degenerative changes in claimant's left knee, but nothing acute. Absent a medical opinion to support claimant's theory, it is difficult for this Board Member to find in her favor.

CONCLUSIONS

Based on the current evidence, this Board Member affirms Judge Sanders' preliminary hearing Order.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[16] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated January 9, 2013, is affirmed.

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[16] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Rebecca Sanders